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March 3, 2006

BY HAND DELIVERY

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: TCEQ Docket No. 2004-0839-AIR; SOAH Docket No. 582-05-1040;
*Application by Southern Crushed Concrete, Inc. to Change the Location of a
Concrete Crushing Facility in Harris County*

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced and numbered proceeding please find and original and twelve (12) copies of Applicant Southern Crushed Concrete, Inc.'s Reply to Exceptions and Brief in Support of Proposal for Decision. Please return one file-stamped copy with the messenger.

Thank you for your attention to this matter. If you have any questions concerning this filing, please do not hesitate to contact me.

Sincerely,



Derek R. McDonald

Enclosures

cc: The Honorable Craig R. Bennett (via hand delivery)
Martina Cartwright (via electronic and U.S. mail)
Iona Givens (via electronic and U.S. mail)
Snehal Patel (via electronic and U.S. mail)
Mary Alice McKaughan (via electronic and U.S. mail)
Brad Patterson (via U.S. mail only)

APPLICATION BY SOUTHERN § BEFORE THE STATE OFFICE
CRUSHED CONCRETE, INC., TO §
CHANGE THE LOCATION OF A § OF
CONCRETE CRUSHING FACILITY IN §
HARRIS COUNTY § ADMINISTRATIVE HEARINGS

**APPLICANT SOUTHERN CRUSHED CONCRETE, INC.'S
REPLY TO EXCEPTIONS
AND
BRIEF IN SUPPORT OF PROPOSAL FOR DECISION**

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
MAR -3 PM 4:35
CHIEF CLERKS OFFICE

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW Applicant Southern Crushed Concrete, Inc. ("SCC") and files this Reply to Exceptions and Brief in Support of Proposal for Decision ("PFD"). For the reasons set forth below, SCC respectfully urges the Texas Commission on Environmental Quality ("TCEQ" or "Commission") to adopt Administrative Law Judge ("ALJ") Craig R. Bennett's Proposed Order and to approve SCC's change of location request, subject to the additional permit conditions set forth in the Proposed Order.

I. Introduction

This matter involves a change of location request filed by SCC seeking to authorize the relocation of an existing, portable concrete crushing facility. The concrete crushing facility that is the subject of this matter was permitted in 1999, when SCC submitted an application to the TCEQ and was issued Air Quality Permit No. 40072. The portable concrete crushing facility authorized by Permit No. 40072 is currently operating at another of SCC's crushing yards in southwest Houston.

In August 2003, SCC applied to the TCEQ for approval of a change of location request seeking to move the crushing facility to property that it owns in Houston, near the intersection of Bellfort Avenue and State Highway 288 ("the 288 Yard"). The Executive

Director issued a draft permit approving SCC's change of location request, and made no changes to the draft permit in response to public comment. In response to requests for contested case hearing, the Commissioners referred the pending change of location request to the State Office of Administrative Hearings ("SOAH") for a contested case hearing.

The Commission's Interim Order referring this matter to SOAH identified six disputed issues of fact:

- (1) Would operation of the facility have an adverse effect on the health of the requesters who live within one mile of the facility?
- (2) Would operation of the facility adversely affect the ability of the requesters to use and enjoy their property or cause damage to the requesters' property?
- (3) Would operation of the facility have an adverse effect on air quality?
- (4) Whether or not the Applicant's emissions calculations and modeling are accurate.
- (5) Is a stockpile limitation necessary and are stockpile emissions adequately addressed in the permit conditions?
- (6) Whether or not the recordkeeping requirements set forth in the draft permit are sufficient to enable enforcement.¹

Although the Commission established a maximum duration of six months for the hearing, the hearing lasted over 13 months, following a series of delays granted in response to three Motions for Continuance filed by the Protestants.

The portable concrete crushing facility that SCC seeks to relocate in this matter emits a total of less than 2.5 tons per year of particulate matter emissions. The site is located in an industrial area, and the nearest residence is over 3000 feet away from the proposed crusher location. As described in the PFD of the Honorable Craig R. Bennett, the parties opposing SCC's change of location request use flawed methods and bad science in presenting their case. The protestants have used inaccurate emissions calculations and a flawed modeling methodology that fails to reliably or accurately predict the impacts of SCC's proposed 288 Yard operations.

¹ *An Interim Order Concerning the Application by Southern Crushed Concrete to Authorize the Relocation of a Portable Rock Crushing Facility*, TCEQ Docket No. 2004-039-AIR (Oct. 4, 2004) [hereinafter Interim Order].

The protestants further compound these flaws by attempting to hold SCC to alternative “standards” for evaluating PM_{2.5} impacts that are well below the current National Ambient Air Quality Standards (“NAAQS”).

The PFD includes a thorough analysis of the parties’ arguments for the many disputed issues in this matter. Judge Bennett found SCC’s emissions calculations and modeling more reliable than that offered by the Protestants, and was wholly unpersuaded by the testimony of Harris County’s witness regarding the evaluation of PM_{2.5} impacts from SCC’s proposed 288 Yard operations. Based on these key findings, along with the other findings discussed in the PFD and included in the Proposed Order, Judge Bennett concluded that the preponderance of the evidence indicates that SCC’s change of location request will be protective of public health and will not create a nuisance, and recommended granting SCC’s request with certain additional permit conditions specified in the Proposed Order.

Judge Bennett recommends the following additional permit conditions in the Proposed Order:

- a. All raw materials and finished product stockpiles shall be sprinkled with water and/or environmentally sensitive chemicals twice daily, except on days when there has been a measurable amount of precipitation at the facility. All applications of water and/or environmentally sensitive chemicals at the facility shall be recorded in a log identifying the date, time, location, and application material (*i.e.*, water or environmentally sensitive chemicals).
- b. Signs shall be posted at the facility indicating that the speed limit on all site roads is six miles per hour.
- c. Paved entrance and exit roads shall be wet swept and vacuumed at least once per day, for each day the facility is operating.
- d. No stockpiles, either raw material or finished product, shall exceed 45 feet in height.²

SCC does not believe that additional permit conditions are necessary for its 288 Yard operations, based on the adequacy of the conditions already included in the draft permit and SCC’s demonstrated ability to operate its crushing yards without adverse impacts on neighbors.

² Proposed Order, at 21.

Nevertheless, SCC supports the PFD and does not object to the additional permit conditions proposed by Judge Bennett for its 288 Yard operations.

Accordingly, SCC respectfully requests that the Commission issue an Order approving SCC's change of location request and directing the issuance of Air Quality Permit No. 70136L001, as modified by Judge Bennett's recommended conditions, that will authorize the construction and operation of a portable concrete crushing facility at SCC's 288 Yard.

SCC's Reply to Exceptions and Brief in Support of Proposal for Decision will address the issues and the other parties' exceptions in the order that Judge Bennett addresses the issues in the PFD. SCC also incorporates by reference its Closing Arguments and Brief in Reply to Closing Arguments in the event that the Commissioners are interested in more details of the overwhelming evidence in the record supporting SCC's relocation request.

II. Whether or not the applicant's emissions calculations and modeling are accurate

The record in this matter strongly supports Judge Bennett's determination that the emissions calculations and modeling presented by SCC were conducted in accordance with TCEQ policy and guidance and represent accurate calculations and predictions of the 288 Yard's air quality impacts.

A. Plant road emissions

1. Paved versus unpaved road calculations

EPA's AP-42 factors for calculating emissions include a "paved road factor" and an "unpaved road factor." SCC used the unpaved road factor in calculating 288 Yard haul road emissions.³ The parties opposing SCC's application take the position that the paved road factor is appropriate. Judge Bennett found that SCC appropriately used the unpaved road factor for calculating road emissions at the 288 Yard.⁴

Judge Bennett's determination is supported by the record, as the expected conditions at the 288 Yard (low speeds, stop-and-go traffic) more closely match those used in developing the unpaved road factor, and coincide with the conditions for which EPA issued a

³ Applicant's Ex. 52, at 17:19-21 (T. Prince).

⁴ PFD, at 8; Proposed Order, at 7-8.

warning against using the paved road factor.⁵ Moreover, as recognized by Judge Bennett, TCEQ permitting guidance allows applicants to use the unpaved road factor for paved roads.⁶ Under the permitting guidance, applicants that are calculating emissions for paved plant roads can use the unpaved road factor to calculate emissions (if appropriate) and then apply a control factor for paving.⁷ It is important to note that the Commission has approved similar uses of the unpaved road factor in no fewer than two previous rulings following contested case hearings.⁸

In its exceptions, the TCEQ's Office of Public Interest Counsel ("OPIC") takes the position that Judge Bennett should not rely on SCC's stated willingness to accept a 6 mile per hour ("mph") speed limit for the 288 Yard roads in determining that the traffic conditions at the 288 Yard better match those used to develop the unpaved road factor.⁹ First, it is entirely appropriate that Judge Bennett take proposed new permit conditions into account for his analysis. More importantly, the 288 Yard vehicle speeds are not solely based on the proposed new permit condition. SCC's representative Mr. Miller testified that the dedicated on-site water truck will travel 0-3 mph, while the haul trucks will travel at speeds of 3-6 mph.¹⁰ Judge Bennett bases his conclusion that the on-site vehicle speeds more closely approximate the speeds used in developing the unpaved road factor not on the proposed new permit condition, but on the record.

Harris County and the City of Houston except to the use of the unpaved road emissions factor, calling the 6 mph speed limit "contrived" and characterizing it as an attempt by SCC to "fall within the unpaved factor."¹¹ It is important to note that SCC's representative Mr. Miller only stated that SCC would agree to posting a 6 m.p.h. speed limit at the 288 Yard in response to a question from Counsel for Harris County.¹² Mr. Miller based his statements regarding on-site vehicle speed on his experience with SCC and its crushing operations, as well as his knowledge of the proposed 288 Yard layout. Haul truck traffic at the 288 Yard will be stop-and-go traffic, with a "long stretch" of only 400-450 feet between a stop at Bellfort Avenue

⁵ Protestants' Ex. 2, at 13.2.1-5 - 13.2.1-6 (AP-42 Section 13.2.1, *Paved Roads*).

⁶ PFD, at 9; Proposed Order, at 8.

⁷ Applicant's Ex. 30, at 46 (TCEQ *Concrete Batch Plants* guidance).

⁸ 2 Tr. 320:19-321:8 (M. Hunt); PFD, at 8 & n.15 (citing *Frontier Materials*, SOAH Docket No. 582-01-2303 and *Ingram Ready Mix*, SOAH Docket No. 582-98-1009).

⁹ OPIC Exceptions at 5.

¹⁰ Applicant's Ex. 51, at 9:3 (J. Miller).

¹¹ Harris County/City of Houston Exceptions at 4.

¹² 1 Tr. 86:21-25 (J. Miller).

and a stop at the scales.¹³ The speeds provided for on-site traffic are completely consistent with the nature of the vehicles that will be at the 288 Yard (large trucks) and the nature of the traffic (short distances between stops for loading, unloading and weighing).

The conditions at the 288 Yard more closely match those used in developing the unpaved road factor, and the record supports Judge Bennett's determination that SCC's emissions calculations are more reliable and that use of the unpaved road factor was appropriate for calculating 288 Yard haul road emissions.

2. Exclusion of road emissions from short-term modeling

The documentary evidence and expert witness testimony in the record conclusively demonstrate that it was proper for SCC to exclude road emissions from short-term modeling runs.¹⁴

Including road emissions in short-term (*i.e.*, 1-hour, 3-hour and 24-hour) modeling runs leads to inaccurate modeling results. The record contains persuasive expert witness testimony on that point,¹⁵ and TCEQ permitting guidance takes the same position.¹⁶ For that reason, TCEQ permitting guidance directs applicants to exclude road emissions from short-term modeling runs.¹⁷ TCEQ relies on the use of best management practices to ensure the proper control of road dust emissions, rather than basing the need for controls on unreliable modeling results.¹⁸ Harris County states in its exceptions that "[t]here is no longstanding TCEQ policy that haul roads should not be included in short-term modeling runs."¹⁹ This is flat wrong. Clear statements in TCEQ's *Air Quality Modeling Guidelines* and a 2000 memorandum from the Director of the Air Permits Division titled *Policy for Road Emissions Evaluation*, quoted in part in the PFD, direct applicants to exclude roads from short-term modeling runs.²⁰ TCEQ has long held the policy that road emissions should not be included in short-term modeling runs, and SCC followed that policy in modeling impacts of the proposed 288 Yard operations.

¹³ 1 Tr. 44:20-45:15 (J. Miller); 3 Tr. 692:8-10 (J. Miller); 3 Tr. 617:4-16 (T. Prince).

¹⁴ PFD, at 10; Proposed Order, at 8-9.

¹⁵ Applicant's Ex. 52, at 23:23-24:4 (T. Prince); 1 Tr. 210:18-23 (T. Prince).

¹⁶ Applicant's Ex. 23, at 58-59 (TCEQ *Air Quality Modeling Guidelines*); Applicant's Ex. 32, at 1 (TNRCC Interoffice Memorandum, *Policy for Road Emissions Evaluation*).

¹⁷ *Id.*

¹⁸ PFD, at 10; Proposed Order, at 8-9 (citing Applicant's Ex. 23 (TCEQ's *Air Quality Modeling Guidelines*) and Applicant's Ex. 32 (TNRCC Interoffice Memorandum, *Policy for Road Emissions Evaluation*)).

¹⁹ Harris County/City of Houston Exceptions, at 6.

²⁰ PFD, at 10.

The policy of excluding road emissions from modeling and using real-world controls to ensure protectiveness is even more appropriate in the present case, where the applicant has committed to go beyond best management practices for control of road dust emissions through the daily use of its own wet sweep and vacuum truck on the 288 Yard's main entrance and exit road.²¹ SCC indicated a willingness to take a permit condition requiring these practices at the 288 Yard in response to questions from counsel for Protestants and Harris County, and Judge Bennett has included such a requirement in the proposed new permit conditions.²²

The PFD also addresses the modeling presented as part of SCC's rebuttal case during the hearing on the merits. SCC's rebuttal case modeling demonstrates that, even if road emissions are included in the short-term model runs (contrary to longstanding TCEQ policy), the model does not predict an exceedance of state or federal standards when road emissions are calculated using the proper factor and accounting for the use of the wet sweep and vacuum controls to which SCC has committed.²³ OPIC's exceptions cite Protestants' modeling results—results that were found to be unreliable by Judge Bennett—in claiming that inclusion of road emissions in the short-term modeling runs demonstrates an exceedance of the 1-hour and 3-hour standards for total suspended particulate (“TSP”).²⁴ Judge Bennett found that SCC's rebuttal case modeling, which includes road emissions in short-term modeling runs and took into account the 288 Yard road dust controls to which SCC committed during the hearing on the merits, was more persuasive than Protestants' modeling.²⁵

Haul road emissions were properly excluded from the short-term modeling runs that SCC used to demonstrate protectiveness in its direct case. Even if road emissions are included, the modeling results in the record found more reliable by Judge Bennett do not predict an exceedance of the property-line TSP standards. As the trier of fact, Judge Bennett serves as the judge of the weight to be given witness testimony, and it is within the province of the trier of fact to decide which expert witness should be credited. *Pilkington v. Kornell*, 822 S.W.2d 223, 230 (Tex. App.—Dallas 1991, writ denied).

²¹ 1 Tr. 92:1-10 (J. Miller); PFD, at 11.

²² Proposed Order, at 21.

²³ 3 Tr. 526:3-532:17 (T. Prince); PFD, at 10-11.

²⁴ OPIC's Exceptions, at 6.

²⁵ PFD, at 11.

3. Use of control factors for predicting road emissions

The record also supports Judge Bennett's conclusion that it was proper for SCC to apply a control factor for paving in calculating emissions from all of the 288 Yard haul roads.²⁶

The protestants challenge SCC's use of a control factor for paving on certain road segments that SCC plans to pave with a compacted milled asphalt service. The conclusion that those road segments (along with the other road segments on the 288 Yard) are properly considered "paved" is supported by extensive testimony in the record about the nature of the road surfaces by SCC's representative Mr. Miller.²⁷ More importantly, the permit itself requires that all on-site haul roads be paved.²⁸ If TCEQ or another regulatory authority with jurisdiction determines that certain 288 Yard haul road segments are not paved with a cohesive hard surface, SCC may be forced to resurface those roads to comply with permit requirements.

The exceptions filed by City of Houston and Harris County disingenuously state that there is no evidence in the record to indicate that SCC's daily wet sweeping and vacuuming of the 288 Yard's main entrance and exit road will result in 99% control efficiency.²⁹ This is not correct. Applicant's Exhibit 30, the TCEQ's current *Concrete Batch Plants* guidance, includes a table of control factors for road emissions (the TCEQ's *Rock Crushing Plants* guidance does not address road emissions). Table C of the *Concrete Batch Plants* guidance assigns a control efficiency of 99% for paved and vacuumed roads.³⁰ SCC's expert witness Tim Prince testified that a 99% control efficiency for SCC's wet sweeping and vacuuming is appropriate.³¹

The records supports Judge Bennett's determination that all the road segments should be considered paved, and that a 99% control efficiency for wet sweeping and vacuuming was properly employed in SCC's rebuttal case modeling.

B. Stockpile emissions

Judge Bennett's determination that SCC used an appropriate formula for calculating stockpile emissions is well-supported by the record in this matter.

²⁶ PFD, at 13; Proposed Order, at 9.

²⁷ 3 Tr. 692:10-13 (J. Miller) (concrete approach); 3 Tr. 692:14-20 (J. Miller) (hot-mix asphalt road segments); 3 Tr. 696:8-13, 698:2-18, 717:6-719:5 (J. Miller) (milled asphalt road segments).

²⁸ Applicant's Ex. 8, at 2 (Draft Permit).

²⁹ Harris County/City of Houston Exceptions, at 3.

³⁰ Applicant's Ex. 30, at p. 46 Table C (TCEQ *Concrete Batch Plants* guidance).

³¹ 3 Tr. 530:6-23 (T. Prince).

It is undisputed that SCC's stockpile emissions calculations were conducted in accordance with the formula provided in TCEQ's current *Rock Crushing Plants* guidance document.³² The formula, which calculates stockpile emissions based on the size of the stockpile (the footprint) and the number of active stockpile days, is a reliable and accurate method for calculating stockpile emissions.³³ Moreover, as described in the PFD, SCC's stockpile emissions calculations incorporate several layers of conservatism. In calculating stockpile emissions, SCC assumed that the entirety of the stockpile would be active (as opposed to a limited portion of the pile), which would tend to overpredict emissions.³⁴ SCC also treated the entirety of the stockpiles as both active *and* inactive for purposes of its calculations, tending to further overpredict emissions.³⁵ SCC's calculations also inflate short-term emissions impacts of the stockpiles by "concentrating" the full day's emissions from the stockpiles into a 10-hour workday.³⁶ Furthermore, SCC's calculations are based on the TCEQ's guidance for rock crushing plants, and as a result will likely overpredict emissions from a *concrete* crushing plant. The record includes the documented observations of TCEQ inspectors that concrete crushing operations generate "noticeably less dust" than rock crushing operations.³⁷ SCC's stockpile emissions calculations represent an accurate and conservative estimate of stockpile emissions from the 288 Yard.

Protestants challenge SCC's reliance on TCEQ's *Rock Crushing Plants* guidance for calculating stockpile emissions because the formula provided in the guidance document does not use stockpile height as a variable in calculating stockpile emissions. Protestants cite the fact that Judge Bennett determined that a stockpile height limitation is appropriate for the 288 Yard operations in attacking SCC's use of the guidance document's calculation formula.³⁸ Protestants' attack on the emissions calculation methodology confuses emissions *rates* with emissions *impacts*. SCC's expert witness modeler does not dispute that stockpile height may affect emissions impacts, testifying that greater stockpile height would likely lead to lower

³² Applicant's Ex. 52, at 17:13-18 (T. Prince); 2 Tr. 364:13-17 (M. Hunt); PFD, at 17; Proposed Order, at 9.

³³ 3 Tr. 551:13-18 (T. Prince).

³⁴ 3 Tr. 555:1-17 (T. Prince).

³⁵ 3 Tr. 555:17-19 (T. Prince).

³⁶ 3 Tr. 554:7-14; 555:14-16 (T. Prince).

³⁷ Applicant's Ex. 39, at 3 (TCEQ Standard Exemption No. 72 Protectiveness Review).

³⁸ Protestants' Exceptions, at 2-3.

lessened impacts (due to greater dispersion).³⁹ The fact that stockpile height may lessen impacts does not undercut the accuracy of SCC's emissions *calculations* for the stockpile. The record supports Judge Bennett's approval of SCC's stockpile emissions calculations.

C. Background concentration

Judge Bennett correctly ruled that SCC selected an appropriate background monitor location for its dispersion modeling.⁴⁰

SCC followed current TCEQ guidance in selecting background monitor location.⁴¹ TCEQ guidance regarding the selection of background monitor locations stresses the proximity of the background monitor to the site of the permit application, and states a preference for monitors located within 10 kilometers of the site.⁴² The Bissonnet monitor used by SCC is approximately 10 kilometers from the 288 Yard and is the nearest available monitor, while the background monitor location suggested by Protestants is twice as far away.⁴³ SCC also selected the Bissonnet monitor location because it is representative of background conditions in the area of the 288 Yard.⁴⁴ As noted in the PFD, the Bissonnet monitor and the 288 Yard are in the same relative location and similar distances from both downtown Houston and the industrial corridor along the Houston Ship Channel, two areas that will impact background concentrations of fine particulate emissions.⁴⁵

Protestants' exceptions appear to place more importance on how long a party spends selecting the background monitor location than the location and representativeness of the monitor location itself. Searching for any angle for attack, Protestants' primary argument relies on the fact that Protestants' expert Mr. Hunt personally visited certain monitor locations.⁴⁶ The nearest representative monitor is the nearest representative monitor, whether an expert witness spends five hours or five days determining which background monitor location should be used. Moreover, Protestants' arguments ignore significant factors that can impact ambient

³⁹ 3 Tr. 556:11-558:8 (T. Prince).

⁴⁰ PFD, at 19; Proposed Order, at 10.

⁴¹ 3 Tr. 558:14-19; 559:9-12 (T. Prince); Applicant's Ex. 33, at 1 (TCEQ *Background Concentration Determination for Use in NAAQS Analyses*).

⁴² Applicant's Ex. 33, at 1 (TCEQ *Background Concentration Determination for Use in NAAQS Analyses*).

⁴³ 3 Tr. 558:14-19; 559:9-12; 561:9-11 (T. Prince).

⁴⁴ 3 Tr. 577:24-25 (T. Prince).

⁴⁵ 3 Tr. 559:20-560:5 (T. Prince); PFD, at 19.

⁴⁶ Protestants' Exceptions, at 4.

concentrations of pollutants, such as the monitor's relative location with regard to downtown Houston or the ship channel corridor. The record supports Judge Bennett's approval of SCC's selection of the Bissonnet monitor for background concentrations.

D. Screen modeling

Prior to submitting the change of location request that is the subject of his proceeding, SCC applied for an alteration to its permit aimed at establishing a 100-foot property-line setback for the aggregate handling, screening and crushing operations authorized in SCC's permit. SCC submitted screen modeling results in support of that alteration. Screen modeling is a conservative modeling tool and was prepared for the limited purpose of demonstrating that operations would be protective given the property-line setback.⁴⁷ The Executive Director approved the permit alteration request, and then used that same modeling in determining that SCC's operations at the 288 Yard would be protective. SCC conducted full refined modeling, a less conservative and more accurate modeling tool, for purposes of this contested case hearing. The results of SCC's refined modeling are part of the record in this proceeding, and SCC's expert witness toxicologist bases his conclusions regarding air quality and the potential for adverse health impacts of the proposed operations on that refined modeling.

Given the that SCC's refined modeling results serve as the basis for SCC's expert witnesses' impacts review, Harris County's continued focus on the prior screen modeling remains a red herring. SCC's expert witness modeler testified that the screen modeling work was accurate and proper for its limited purpose of establishing the setback condition.⁴⁸ The record supports Judge Bennett's conclusion that the screen modeling work submitted by SCC prior to the pending change of location request was not conducted in error.

III. Would operation of the facility have an adverse effect on the health of the requesters who live within one mile of the facility

The record in this matter conclusively establishes that SCC's proposed 288 Yard operations will not adversely affect the health of persons who live within one mile of the facility.

⁴⁷ Applicant's Ex. 52, at 31:1-3 (T. Prince).

⁴⁸ Applicant's Ex. 52, at 32:9-16 (T. Prince).

A. NAAQS PM_{2.5} concerns

1. The conclusions in the PFD are supported by the record

All parties in this matter agree that maximum predicted off-property concentrations of PM_{2.5} from SCC's 288 Yard operations—from both SCC's and the Protestants' modeling—fall below the current primary and secondary PM_{2.5} National Ambient Air Quality Standards ("NAAQS").⁴⁹ This fact alone supports a conclusion that PM_{2.5} emissions from the proposed 288 Yard operations will not have an adverse effect on the health of requesters who live within one mile of the facility. This is particularly true in the present case, where the nearest residence is over 3,000 feet from the proposed location of the concrete crushing facilities.⁵⁰ NAAQS are established at levels designed to protect even the most sensitive individuals, with an adequate margin of safety.⁵¹ As stated in the PFD, if the Commission determines that compliance with the existing NAAQS is sufficient to ensure no adverse health effects from criteria pollutants, no further analysis is necessary.⁵²

Judge Bennett goes on to analyze the potential for adverse health effects from PM_{2.5} in the event that the Commission does not decide that comparison of the model results to the current NAAQS concludes the analysis. In particular, Judge Bennett evaluates the position taken by Harris County's witness Lucy Fraiser, who testified in this matter that "adverse health impacts could potentially occur" if off-property concentrations of PM_{2.5} exceed her alternative PM_{2.5} benchmarks of 12 µg/m³ annual average (compared to a current NAAQS of 15 µg/m³) or 25 µg/m³ 24-hour average (compared to a current NAAQS of 65 µg/m³).⁵³ Judge Bennett concludes that there will be no adverse health effects on persons who reside within a mile of the 288 Yard, irrespective of the threshold.⁵⁴ The record supports Judge Bennett's conclusion.

Key to Judge Bennett's analysis is that the EPA Staff Paper and studies cited therein that serve as the basis for Lucy Fraiser's opinion indicate that the *nature* of PM_{2.5} emissions plays a significant role in determining whether PM_{2.5} will result in adverse health

⁴⁹ Applicant's Ex. 27 (Applicant's Maximum Predicted Concentrations); Protestants' Ex. 9 (Protestants' Maximum Predicted Concentrations); 2 Tr. 306:21-307:12 (M. Hunt); PFD, at 25; Proposed Order, at 11-12.

⁵⁰ Applicant's Ex. 51, at 16:27-29 (J. Miller); Applicant's Ex. 50, at 6:27-7:2 (C. Romero).

⁵¹ Applicant's Ex. 53, at 11:21-23 (T. Dydek); 2 Tr. 398:22-25 (L. Fraiser).

⁵² PFD, at 25.

⁵³ Harris County's Ex. 28, at 11:38-43 (L. Fraiser).

⁵⁴ PFD, at 25; Proposed Order, at 12.

impacts.⁵⁵ In reviewing a number of studies relating to fine particulate matter emissions, the Staff Paper states:

These studies reported that fine particulates from combustion sources, including motor vehicle emissions, coal combustion, oil burning, and vegetative burning were associated with increased mortality. No significant increase in mortality was reported with a source factor representing crustal material in fine particles. These studies indicate that exposure to fine particles from combustion sources, not crustal material, is associated with mortality.⁵⁶

Fine particulate emissions from “crustal material” are not driving EPA Staff’s evaluation of the protectiveness of the current PM_{2.5} NAAQS. Dr. Dydek, testifying on behalf of SCC, included analyses of the constituents of cement and concrete in his prefiled testimony.⁵⁷ Based on these analyses, Dr. Dydek characterizes concrete dust from concrete crushing operations as crustal in nature.⁵⁸ Judge Bennett agrees, concluding that, “[a]t a minimum, it appears the majority of emissions will come from materials that can be classified as crustal in nature.”⁵⁹ Judge Bennett’s conclusion is based on the record and the reliable testimony of Dr. Dydek, founded in his analysis of the constituents of concrete and concrete dust emissions. The record supports Judge Bennett’s conclusions regarding both the risks associated with PM_{2.5} and the nature of the PM_{2.5} emissions from SCC’s 288 Yard.

2. The parties’ exceptions merit no changes to the proposed findings

The exceptions filed by Harris County, the City of Houston and OPIC advocate the use of Lucy Fraiser’s alternative PM_{2.5} thresholds in evaluating potential impacts from SCC’s proposed 288 Yard operations. Judge Bennett’s analysis of potential PM_{2.5} impacts in the PFD is not based solely on the current NAAQS. In addition, as Judge Bennett pointed out in the PFD, “there is no basis to believe that [the PM_{2.5} NAAQS] will be lowered to the levels recommended

⁵⁵ PFD, at 26.

⁵⁶ Harris County’s Ex. 4, at 3-16. *See also* Harris County’s Ex. 5, at 33, 35 (*Eight Canadian Cities* study) (reporting that the correlation between PM_{2.5} concentrations and mortality is dependent on the chemical components of the PM_{2.5}); Harris County’s Ex. 6, at 6, Table 9 (*Phoenix* study) (finding no increased health risk for exposure to soil-related fine particles, while positive correlations were found for particles containing sulfates or combustion-related materials).

⁵⁷ Applicant’s Exs. 44, 45 and 48.

⁵⁸ 2 Tr. 286:8-17, 288:12 (T. Dydek).

⁵⁹ PFD, at 26; Proposed Order, at 13.

by Dr. Fraiser in this case.”⁶⁰ She has “cherry-picked” the lowest annual and 24-hour average numbers from a series of *alternative* ranges presented in the EPA Staff Paper and paired those numbers to come up with PM_{2.5} thresholds that are more restrictive than any contemplated in the Staff Paper.⁶¹

The exceptions filed by Harris County and the City of Houston also spill a great deal of ink arguing that greater weight be given to Lucy Fraiser’s statements on the potential for contamination of concrete. The opinions expressed by Lucy Fraiser on this issue were unsupported by evidence. Without citing any evaluation of concrete or other evidence, she speculates that toxics could be found in concrete from urban settings. No evidence was presented or study cited indicating that concrete dust would contain trace contaminants at levels that would cause the concrete dust from SCC’s crushing operations to be considered anything other than uncontaminated crustal material. As part of SCC’s rebuttal case, Dr. Dydek reiterated his opinion that the emissions from SCC’s crushing operations are equivalent to uncontaminated crustal material.⁶² In weighing the protestants’ speculative testimony against Dr. Dydek’s conclusions, based on his rebuttal case research into possible contaminants and his analysis of concrete and concrete dust, Judge Bennett properly assigned Dr. Dydek’s testimony greater weight.

OPIC’s exceptions mischaracterize Dr. Dydek’s position regarding the potential health impacts of SCC’s proposed 288 Yard operations. In its exceptions, OPIC states that “both Applicant’s and Protestants’ experts agree that a potential for adverse health effects exists.”⁶³ At no point in this matter has Dr. Dydek stated that SCC’s proposed 288 Yard operations have a potential to adversely impact any resident. The portion of Dr. Dydek’s prefiled testimony that OPIC cites as support for its position says nothing about emissions impacts from the 288 Yard.

Dr. Dydek states in his prefiled testimony, “I agree with Dr. Fraiser in that there is a *potential* for adverse health impacts to occur at annual average PM_{2.5} concentrations between

⁶⁰ PFD, at 26.

⁶¹ Harris County’s Ex. 4, at 5-46 (EPA Staff Paper); Applicant’s Ex. 53, at 13:17-20 (T. Dydek). Subsequent to the record closing in this matter, EPA issued proposed revisions to the PM_{2.5} NAAQS. To no one’s surprise, the proposed levels bear no resemblance to the alternative benchmarks put forth by Lucy Fraiser during the hearing.

⁶² 3 Tr. 634:23-635:2 (T. Dydek).

⁶³ OPIC’s Exceptions, at 7.

the current standard ($15 \mu\text{g}/\text{m}^3$) and the level cited by Dr. Fraiser ($12 \mu\text{g}/\text{m}^3$).⁶⁴ Dr. Dydek adds that he disagrees with Lucy Fraiser's use of $12 \mu\text{g}/\text{m}^3$ as a benchmark for evaluating applications, because "there is not, in my opinion, sufficient data or information about the *likelihood* of adverse impacts at those concentrations to support their use as a benchmark in evaluating potential health impacts."⁶⁵ Dr. Dydek acknowledges that there is a *potential* for adverse health impacts due to $\text{PM}_{2.5}$ concentrations at levels lower than the current NAAQS. He does not agree with Lucy Fraiser's use of $12 \mu\text{g}/\text{m}^3$ as a benchmark for evaluating health impacts of $\text{PM}_{2.5}$. Most importantly, Dr. Dydek *does not* state that the $\text{PM}_{2.5}$ impacts from SCC's proposed 288 Yard operations have the potential to adversely impact any residents. Dr. Dydek clearly expresses the *opposite* opinion:

Q. If $\text{PM}_{2.5}$ were considered separately, would there be any adverse health or welfare impacts from SCC's proposed 288 Site operations in your opinion?

A. No.⁶⁶

Contrary to OPIC's claim, the record demonstrates that SCC's expert *does not* agree with Harris County's expert that $\text{PM}_{2.5}$ emissions from the 288 Yard operations have a potential for adverse health effects.

3. Legal and policy considerations for $\text{PM}_{2.5}$

a. Use of PM_{10} as a surrogate

There is no legal requirement to evaluate $\text{PM}_{2.5}$ as part of the permitting process. Current EPA and TCEQ policy directs permit applicants to evaluate the potential impacts of PM_{10} and to use the PM_{10} impacts evaluation as a surrogate for a $\text{PM}_{2.5}$ evaluation.⁶⁷ The TCEQ's *Air Quality Modeling Guidelines* state the following regarding $\text{PM}_{2.5}$:

Compliance with the pre-1997 form of the PM_{10} NAAQS will be the surrogate for compliance with the 1997 form of the PM_{10} NAAQS, and the new $\text{PM}_{2.5}$ NAAQS, until EPA publishes new

⁶⁴ Applicant's Ex. 53, at 13:2-4 (T. Dydek).

⁶⁵ Applicant's Ex. 53, at 13:14-16 (T. Dydek).

⁶⁶ Applicant's Ex. 53, at 18:22-24 (T. Dydek).

⁶⁷ Applicant's Ex. 52, at 26:23-27:14 (T. Prince).

technical review procedures. The ADMT will post the new procedures on the ADMT Internet page when they are effective.⁶⁸

EPA has adopted the same position, stating in guidance that, "[i]n view of the significant technical difficulties that now exist with respect to PM_{2.5} monitoring, emissions estimation, and modeling (described below) EPA believes that PM₁₀ may properly be used as a surrogate for PM_{2.5} in meeting NSR requirements until these difficulties are resolved."⁶⁹

It is currently the policy of both TCEQ and EPA that demonstrating compliance with the PM₁₀ NAAQS is sufficient to show compliance with the PM_{2.5} NAAQS. A demonstration limited to PM₁₀ satisfies SCC's obligations with regard to demonstrating that emissions of PM_{2.5} will be protective. As stated in the PFD, the modeling performed by both SCC and the Protestants predicts maximum impacts of PM₁₀ that fall below the NAAQS.⁷⁰ Under TCEQ and EPA permitting policy, no further analysis of PM_{2.5} is required.

b. Permit policy and alternative PM_{2.5} benchmarks

Despite current policy allowing the use of PM₁₀ as a surrogate, SCC evaluated potential PM_{2.5} impacts of the 288 Yard for this contested case hearing, to further demonstrate that SCC's 288 Yard operations will be protective. Harris County witness Lucy Fraiser complicates the PM_{2.5} analysis with her alternative PM_{2.5} benchmarks. In discussing the alternative benchmarks, Judge Bennett recognizes that it is not possible to predict whether EPA will choose to modify the PM_{2.5} NAAQS in the future and, if so, how it may change the PM_{2.5} NAAQS.⁷¹ Given this uncertainty, using Harris County's alternative PM_{2.5} thresholds to evaluate the predicted impacts of PM_{2.5} from SCC's 288 Yard operations would (1) set new precedent in Texas for PM_{2.5} impacts reviews that was not based on the NAAQS, rendering the current NAAQS meaningless for permit reviews, or (2) risk arbitrary treatment of SCC's application, as the only permit application ever held to Harris County's alternative thresholds for PM_{2.5} impacts.⁷²

⁶⁸ Applicant's Ex. 23, at 17 (TCEQ *Air Quality Modeling Guidelines*).

⁶⁹ Applicant's Ex. 34, at 1 (EPA, *Interim Implementation of New Source Review Requirements for PM_{2.5}*).

⁷⁰ Applicant's Ex. 27 (Applicant's Maximum Predicted Concentrations); Protestants' Ex. 9 (Protestants' Maximum Predicted Concentrations); Proposed Order, at 11.

⁷¹ PFD, at 25-26.

⁷² As noted above, the PFD states that "there is no basis to believe that [the PM_{2.5} NAAQS] will be lowered to the levels recommended by Dr. Fraiser in this case." PFD, at 26. If EPA revises the PM_{2.5} NAAQS following rulemaking, the revised NAAQS levels are unlikely to coincide with Dr. Fraiser's alternative thresholds. Analysis

Under current TCEQ policy, SCC's demonstration that impacts fall below the PM₁₀ NAAQS satisfy its obligations with regard to PM_{2.5}. Should the Commission take PM_{2.5} into consideration, SCC's application should be evaluated using the current PM_{2.5} NAAQS, and not Harris County's alternative benchmarks or proposed revisions to the PM_{2.5} NAAQS.⁷³ It is undisputed that modeled impacts of PM_{2.5} fall below the current NAAQS. Moreover, even if the current NAAQS are *not* used as the standard for evaluating protectiveness, the record demonstrates that the PM_{2.5} emissions from the proposed 288 Yard concrete crushing operations will not have an adverse health impact on persons residing within one mile of the site. The record in this matter supports Judge Bennett's conclusion that SCC met its burden regarding the potential for adverse health impacts from PM_{2.5}.

B. One-hour and three-hour property-line standards for TSP

Total suspended particulate ("TSP") emissions from SCC's proposed 288 Yard operations will not cause adverse health effects for persons living within one mile of the facility.⁷⁴ There was no evidence presented in this matter that the property-line TSP standards established in 30 TEX. ADMIN. CODE § 111.155 are health-based standards, or that a modeled exceedance of those TSP standards would support a claim that a project will adversely effect the health of nearby residents. Moreover, the modeling results in the record deemed more reliable by Judge Bennett demonstrate that the proposed facility will not cause net ground level concentrations of TSP to exceed those TSP property-line standards.

Applicant's dispersion modeling, which excluded road emissions from short-term modeling runs in accordance with TCEQ policy and guidance, predicted maximum off-property TSP impacts well below the standards in 30 TEX. ADMIN. CODE § 111.155.⁷⁵ Judge Bennett found that SCC properly excluded road emissions from short-term modeling runs.⁷⁶ Moreover, SCC's rebuttal case modeling, which *included* road emissions in the short-term modeling runs for TSP and took into account SCC's commitment during the hearing to daily wet sweeping and vacuuming of roads at the 288 Yard, predicts maximum impacts below the State property-line

of future permits using revised PM_{2.5} NAAQS levels would leave SCC's application as perhaps the only air permit application ever evaluated using Dr. Fraiser's alternative thresholds for PM_{2.5}.

⁷³ See *In re Ecoelectrica*, 7 E.A.D. 56, n.21 (E.A.B. 1997) (rejecting argument that EPA must determine, before acting on an application, the extent to which it would be subject to future NAAQS revisions).

⁷⁴ PFD, at 27; Proposed Order, at 13.

⁷⁵ Applicant's Ex. 27 (Applicant's Maximum Predicted Concentrations).

⁷⁶ PFD, at 10; Proposed Order, at 8-9.

standards for TSP.⁷⁷ Judge Bennett found Applicant's rebuttal case modeling more reliable than the modeling presented by Protestants.⁷⁸

The property-line TSP standards established in 30 TEX. ADMIN. CODE § 111.155 are not health-based standards, and an exceedance of those standards should not serve as a basis for concluding that an application would cause adverse health effects. Nevertheless, even if the TSP standards are evaluated as part of a health impacts review, the more reliable modeling in the record predicts maximum property line TSP impacts below the net ground-level concentration limits found in 30 TEX. ADMIN. CODE § 111.155. Moreover, as noted by Judge Bennett in the PFD,⁷⁹ the 30 TEX. ADMIN. CODE § 111.155 standards at issue were proposed for repeal by TCEQ on November 9, 2005, based on a determination that § 111.155 "is not based on good science nor is it current and necessary."⁸⁰

C. Crystalline silica emissions

Judge Bennett correctly determined that emissions of crystalline silica from SCC's proposed 288 Yard operations will not cause adverse health effects for persons living within a mile of the facility.⁸¹ SCC's modeling results—found more reliable than the modeling offered by Protestants—predict maximum off-property impacts of crystalline silica that fall below the applicable 24-hour and annual crystalline silica Effects Screening Levels ("ESLs").⁸² Based on those modeling results, SCC's expert witness toxicologist Dr. Dydek testified that crystalline silica emissions from SCC's operations will not have an adverse impact on any resident.⁸³

Protestants' modeling results, which include road emissions in short-term modeling runs and were found less reliable by Judge Bennett than the modeling offered by SCC, predict an exceedance of the 24-hour crystalline silica ESL. Nevertheless, based on the minimal exceedance of the 24-hour ESL, the low number of predicted exceedances, the location of the predicted exceedances (industrial property), and the fact that Protestants' modeling predicts

⁷⁷ 3 Tr. 532:8-17 (T. Prince); Applicant's Ex. 57.

⁷⁸ PFD, at 11; Proposed Order, at 9.

⁷⁹ PFD, at 5 n.9.

⁸⁰ 30 Tex. Reg. 7821, 7822 (Nov. 25, 2005).

⁸¹ PFD, at 28; Proposed Order, at 13-14.

⁸² Applicant's Ex. 27 (Applicant's Maximum Predicted Concentrations).

⁸³ Applicant's Ex. 53, at 28:1-3 (T. Dydek).

maximum *annual* off-property silica concentrations less than 50% of the annual ESL, SCC's expert witness toxicologist Dr. Dydek testified that no adverse health effects are anticipated based on *Protestants'* crystalline silica modeling results.⁸⁴ Harris County's witness Lucy Fraiser agrees, concluding that "health effects associated with silica exposure are unlikely."⁸⁵ As stated in the PFD, there is no evidence in the record to justify a concern that silica emissions from SCC's proposed 288 Yard operations will present any danger to the health of persons living within a mile of the 288 Yard.⁸⁶

IV. Would operation of the facility adversely affect the ability of the requesters to use and enjoy their property or cause damage to the requesters' property

The record leads to the inescapable conclusion that operation of the portable concrete crushing facility at the 288 Yard will not adversely affect the ability of the requesters to use and enjoy their property, or cause damage to the requesters' property.

A. Modeled impacts of total suspended particulate matter emissions

Judge Bennett's decision is supported by the modeled emissions impacts from the proposed 288 Yard operations. SCC's dispersion modeling, which excluded road emissions from short-term modeling runs in accordance with TCEQ policy and guidance, predicted maximum off-property TSP impacts well below the standards in 30 TEX. ADMIN. CODE § 111.155.⁸⁷ Judge Bennett found that SCC properly excluded road emissions from its short-term modeling runs.⁸⁸ Moreover, SCC's rebuttal case modeling, which *included* road emissions in the short-term modeling runs for TSP and took into account SCC's commitment during the hearing to daily wet sweeping and vacuuming of roads at the 288 Yard, also demonstrated maximum impacts below the State property-line standards for TSP.⁸⁹ Judge Bennett also found SCC's rebuttal case modeling more reliable than the modeling presented by Protestants.⁹⁰

The more reliable modeling results in the record predict maximum property-line impacts of TSP below the standards established in 30 TEX. ADMIN. CODE § 111.155. Additionally, as noted above, TCEQ has proposed to repeal the § 111.155 standards at issue,

⁸⁴ Applicant's Ex. 53, at 28:19-29:29 (T. Dydek).

⁸⁵ Harris County's Ex. 28, at 23:12-14 (L. Fraiser).

⁸⁶ PFD, at 28.

⁸⁷ Applicant's Ex. 27 (Applicant's Maximum Predicted Concentrations).

⁸⁸ PFD, at 10; Proposed Order, at 8-9.

⁸⁹ 3 Tr. 532:8-17 (T. Prince); Applicant's Ex. 57.

⁹⁰ PFD, at 11; Proposed Order, at 9.

based on a determination that § 111.155 “is not based on good science nor is it current and necessary.”⁹¹

B. SCC’s operations and the 288 Yard

The conclusion that SCC’s 288 Yard operations will not cause a nuisance or adversely impact the use or enjoyment of property makes perfect sense, given the nature of SCC’s operations and the 288 Yard. SCC seeks to relocate a portable rock crushing facility that is authorized to emit a *total* of 2.49 tons per year (“tpy”) of particulate matter and 1.23 tpy of PM₁₀.⁹² The 288 Yard is a 58-acre tract, and SCC’s crushing operations will occupy approximately 15 of those acres. SCC currently plans to leave the remaining 43 acres of the property undeveloped as buffer during its crushing operations.⁹³ The modeling results are consistent with what would be expected from such a low-emitting source sited on a large piece of property.

C. SCC’s compliance history

The record fully supports Judge Bennett’s determination that the past notices of violation (“NOVs”) cited by Harris County and the City of Houston are not persuasive regarding the likelihood of future adverse impacts on the use or enjoyment of the requesters’ property.

The exceptions filed by Harris County and the City of Houston argue that Judge Bennett “completely ignored” the testimony of Harris County inspector Ms. Guynn.⁹⁴ This is not the case. Harris County and the City of Houston further argue that Judge Bennett improperly focused on SCC’s recent compliance history.⁹⁵ It was proper for Judge Bennett to focus on SCC’s recent compliance history in evaluating the potential for nuisance from SCC’s proposed 288 Yard operations. Moreover, an analysis of SCC’s full compliance record supports the conclusion that no adverse property impacts or nuisance will result from operations at the 288 Yard. SCC has been issued seven nuisance dust-related violation notices since 1999 by Harris County or TCEQ. That is seven violation notices, none of which carried a fine or penalty, over

⁹¹ 30 Tex. Reg. 7821, 7822 (Nov. 25, 2005).

⁹² Applicant’s Ex. 8, at MAERT (Draft Permit).

⁹³ 1 Tr. 120:5-21 (J. Miller).

⁹⁴ Harris County/City of Houston Exceptions, at 14-15.

⁹⁵ Harris County/City of Houston Exceptions, at 15-16.

six years of operation for a company that has operated five portable concrete crushers at 11 concrete crushing yards in the greater Houston area.

Moreover, a focus on SCC's recent compliance history provides strong evidence that the 288 Yard will not adversely impact or damage neighbors' property. In response to Harris County's issuance of a road-dust related violation notice in 2002, SCC developed an approach for controlling road dust emissions that has prevented issuance of further violations. SCC's approach has three elements. First, SCC installs a concrete "approach" that has a corrugated surface (referred to as a rumble strip) where each yard's main entrance road meets the public road.⁹⁶ Second, SCC paves the entirety of each plant's main entrance road with hot-mix asphalt.⁹⁷ Third, and most significantly, SCC purchased a wet sweep and vacuum truck that wet sweeps and vacuums each SCC yard's main entrance road, as well as the public road near the yard entrance, on a daily basis.⁹⁸ At the hearing on the merits in this matter, Mr. Miller of SCC stated a willingness to accept a permit condition requiring daily operation of the wet sweep and vacuum truck at the 288 Yard.⁹⁹

Since SCC instituted those measures to better control road emissions at its yards in 2002, Harris County has not issued a nuisance dust violation notice to SCC.¹⁰⁰ SCC has operated five concrete crushing facilities at 11 concrete crushing yards in the greater Houston area since May 2002 without a single notice of violation. At the hearing on the merits, Harris County inspector Ms. Guynn confirmed that Harris County's file database has *no* record of a citizen *complaint* relating to dust from SCC's operations since 2002!¹⁰¹ There is every reason to believe that SCC's nuisance-free operations will continue at the 288 Yard.

The exceptions filed by Harris County and the City of Houston also challenge Judge Bennett's assertion that the crusher that SCC seeks to relocate to the 288 Yard has a perfect 0.0 compliance history site rating.¹⁰² Citing the fact that Applicant's Exhibit 19 (SCC's application for change of location) lists 5001 Gasmer Road as the location of the crusher and Applicant's Exhibit 7 (TCEQ's compliance history rating) lists 14329 Chrisman Road as the

⁹⁶ 1 Tr. 86:5-7 (J. Miller).

⁹⁷ 3 Tr. 692:14-20 (J. Miller); Applicant's Ex. 51, at 8:12 (J. Miller).

⁹⁸ Applicant's Ex. 51, at 6:8-14 (J. Miller).

⁹⁹ 1 Tr. 92:1-10 (J. Miller).

¹⁰⁰ 2 Tr. 449:22-450:1 (E. Guynn).

¹⁰¹ 2 Tr. 450:2-6; 453:14-18 (E. Guynn).

¹⁰² Harris County/City of Houston Exceptions, at 16.

location of the crusher, Harris County and the City of Houston assert that Judge Bennett's statement regarding SCC's compliance history must be incorrect. Not surprisingly, the assertion made by Harris County and the City of Houston is in-fact incorrect. The difference in location is explained by the fact that the portable concrete crusher authorized by TCEQ Air Quality Permit No. 40072 (identified on both documents) moved from 5001 Gasmer Road to 14329 Chrisman Road during while the application was pending — that is, after the change of location request was filed but before the compliance history rating was scored.¹⁰³ Judge Bennett's statements regarding the crushing facility's compliance history site rating are correct and supported by the record.

D. Protestants' lay witness testimony has no foundation

Protestants except to Judge Bennett's decision to discount of the lay witness testimony of Protestants' witnesses Mr. Rubenstein and Mr. Stephenson for lack of foundation.¹⁰⁴ While both witnesses may have "experience in their respective fields," it is undisputed that both witnesses simply stated concerns relating to dust impacts on their companies' operations, with absolutely zero basis. Neither witness was qualified as an expert witness to opine as to the impact of dust on pipe (Mr. Rubenstein) or plant life (Mr. Stephenson). More importantly, neither Mr. Rubenstein nor Mr. Stephenson had any basis for concluding that dust from SCC's operations might actually impact their respective companies' pipe or plant stock.¹⁰⁵ Neither witness cited modeling results or any other study or report stating that emissions from SCC's operations would actually impact their operations. Both Mr. Stephenson and Mr. Rubenstein provided lay witness speculation with no foundation. The record supports Judge Bennett's conclusion that neither Mr. Stephenson nor Mr. Rubenstein provided evidence of an adverse impact from SCC's proposed 288 Yard operations. As noted above, it is within the province of Judge Bennett's to determine the weight to be given witness testimony. *Pilkington v. Kornell*, 822 S.W.2d 223, 230 (Tex. App.—Dallas 1991, writ denied).

V. Would operation of the facility have an adverse effect on air quality

SCC's proposed 288 Yard operations will not have an adverse effect on air quality. Modeling found more reliable by Judge Bennett demonstrates that maximum predicted

¹⁰³ 1 Tr. 101:18-102:16 (J. Miller).

¹⁰⁴ Protestants' Exceptions, at 5-6.

¹⁰⁵ 2 Tr. 498:25-490:9 (S. Rubenstein); 2 Tr. 380:23-381:2, 384:12-23 (G. Stephenson).

off-property concentrations of PM₁₀ and PM_{2.5} will fall below the applicable primary and secondary NAAQS.¹⁰⁶ That same modeling also demonstrates that maximum predicted property-line emissions of TSP fall below the Texas property-line TSP standards of 30 TEX. ADMIN. CODE § 111.155.¹⁰⁷ Applicant's modeling also predicts maximum property-line concentrations of crystalline silica, the one pollutant emitted by the 288 Yard operations that is not subject to a State or federal standard, that fall below the applicable ESLs, and the toxicologists testifying on behalf of both SCC and Harris County concluded that impacts of crystalline silica present no threat to human health.¹⁰⁸ The record fully supports the conclusion that SCC's proposed operations will not have an adverse impact on air quality.

The exceptions filed by Harris County and the City of Houston cite the Texas Clean Air Act's definition of "air pollution" in urging Judge Bennett to apply a new, undefined "standard" outside the methodologies or standards that are used in Texas to evaluate air quality impacts.¹⁰⁹ While modeling results that predict maximum off-property impacts below the applicable State and federal standards provide a basis in the record for concluding that the 288 Yard operations will not have an adverse impact on air quality, Judge Bennett's analysis was not limited to a comparison with those standards. The PFD thoroughly analyzes the opposing parties' arguments relating to PM_{2.5} concentrations below the current NAAQS and, taking the evidence and EPA Staff Paper proposals into account, concludes that PM_{2.5} emissions from the 288 Yard project do not present a threat to human health or welfare. There is no basis in the record for concluding that the proposed 288 Yard operations will result in adverse impacts on air quality, even in the context of the Texas Clean Air Act's broad definition of "air pollution."

VI. Is a stockpile limitation necessary and are stockpile emissions adequately addressed in the permit conditions?

Stockpile emissions are adequately addressed by the draft permit conditions and the two additional stockpile-related conditions that Judge Bennett included in the Proposed Order. While SCC does not believe that additional permit conditions are necessary, based on the adequacy of the stockpile conditions already included in the permit and the SCC's demonstrated ability to operate without adverse impacts on neighbors, SCC does not object to the conditions

¹⁰⁶ Applicant's Ex. 27 (Applicant's Maximum Predicted Concentrations).

¹⁰⁷ *Id.*

¹⁰⁸ Applicant's Ex. 53, at 28:19-29:29 (T. Dydek); Harris County's Ex. 28, at 23:12-14 (L. Fraiser).

¹⁰⁹ Harris County/City of Houston Exceptions, at 17.

proposed by Judge Bennett, provided the new conditions apply only to SCC's operations at the 288 Yard.

The draft permit contains the following conditions relating to the control of stockpile emissions:

- Condition 4: Except for those periods described in 30 T.A.C. §§ 101.201 and 101.211, no visible fugitive emissions from the stockpiles shall leave the property.
- Condition 5.A: Area-type of truck-mounted water sprays shall be operated at all product stockpiles and active work areas.
- Condition 5.B: All roads and product stockpiles shall be sprinkled with water and/or environmentally sensitive chemicals upon detection of visible particulate emissions to maintain compliance with all TCEQ rules and regulations.
- Condition 8.E.(3): All future relocation and change of location applications shall comply with the following conditions: . . . (3) Stockpiles and vehicle traffic areas (except for entrance and exit to the site) shall be located at least 25 feet from any property line. In lieu of meeting the distance requirements for roads and stockpiles, the following may occur: . . . (b) Stockpiles within this buffer distance must be contained within a three-walled bunker which extends at least two feet above the top of the stockpile.
- MAERT: Emission estimates of 1.25 tpy PM and 0.63 tpy PM₁₀.¹¹⁰

In the Proposed Order, Judge Bennett proposes adding the following conditions relating to the stockpiles:

- All raw material and finished product stockpiles shall be sprinkled with water and/or environmentally sensitive chemicals twice daily, except on days when there has been a measurable amount of precipitation at the facility.
- No stockpiles, either raw material or finished product, shall exceed 45 feet in height.¹¹¹

SCC does not object to including these additional conditions in the permit for operations at the 288 Yard. These conditions have been added in response to specific concerns raised in a contested case hearing relating to this particular site. Certain factors, such as the size of the yard, will allow SCC to operate at the 288 Yard with conditions like a stockpile height limitation. At other yards, conditions such as the stockpile height limitation would unreasonably impact

¹¹⁰ Applicant's Ex. 8, 1-2, MAERT (Draft Permit).

¹¹¹ Proposed Order, at 21.

operations and place SCC at a severe competitive disadvantage. Given that the 288 Yard is the only site at issue in this hearing, it is appropriate to limit any conditions that result from this hearing to operations at the 288 Yard.

The exceptions filed by Harris County and the City of Houston request a change to Judge Bennett's proposed stockpile watering condition that is unnecessary. The exceptions request a similarly worded provision that adds the phrase "and as necessary" to the condition — *i.e.*, rather than a requirement to water "at least twice daily," the condition would read "at least twice daily and as necessary."¹¹² Given the stockpile watering obligations that are already found in the draft permit, the change requested by Harris County and the City of Houston is superfluous. Existing condition 5.B. quoted above already requires stockpile watering "upon detection of visible particulate emissions to maintain compliance with all TCEQ rules and regulations."¹¹³ The existing conditions, combined with Judge Bennett's proposed condition that stockpiles be watered at least twice daily on days with no measurable amount of precipitation, makes Harris County and the City of Houston's requested change unnecessary. The record does not support the change demanded by Harris County and the City of Houston.

VII. Whether or not the recordkeeping requirements set forth in the draft permit are sufficient to enable enforcement.

The recordkeeping requirements set forth in the draft permit, combined with the new recordkeeping requirement proposed by Judge Bennett in the Proposed Order, are sufficient to enable enforcement of the permit conditions.

A. Recordkeeping for emissions for processing rates and emissions controls

Judge Bennett proposes one additional permit condition in the Proposed Order that adds recordkeeping requirement relating to all on-site watering activities. While SCC does not believe that additional recordkeeping is necessary to enable enforcement of the permit conditions, SCC does not object to the additional recordkeeping requirements proposed by the Judge Bennett for its 288 Yard operations.

SCC's draft permit contains the following recordkeeping requirements relating to processing rates and road cleaning:

¹¹² Harris County/City of Houston Exceptions, at 18.

¹¹³ Applicant's Ex. 8, at 1-2 (Draft Permit).

Records shall be kept for a rolling two-year period and maintained which reflect compliance with General Condition No. 7, the maximum allowable emission rates table (MAERT), and NSPS requirements, including the following:

- A. Daily and annual amounts of materials processed;
- B. Daily road cleaning; and
- C. Records of all repairs and maintenance of abatement systems.¹¹⁴

The draft permit's recordkeeping provisions relate to the two primary factors affecting emission rates and potential off-property impacts: material processing rates and emissions controls. In the Proposed Order, the Judge Bennett proposes adding the following recordkeeping requirement relating to SCC's use of the water controls:

- All applications of water and/or environmentally sensitive chemicals at the facility shall be recorded in a log identifying the date, time, location, and application material (*i.e.*, water or environmentally sensitive chemicals).¹¹⁵

As with the other additional permit conditions proposed by Judge Bennett, which have been proposed in response to specific concerns raised with regard to this specific site, SCC does not object to including these additional conditions in the draft permit for its operations at the 288 Yard. The new "288 Yard contested case" permit provisions should apply only at the 288 Yard.

B. Asbestos recordkeeping is unnecessary and unduly burdensome

The record strongly supports Judge Bennett's determination that a recordkeeping requirement relating to the permit's prohibition on crushing asbestos-containing materials is wholly unnecessary.¹¹⁶ The draft permit does not require, and TCEQ has never required, SCC or other concrete crushers to keep records of the materials crushed at a site to demonstrate compliance with the asbestos crushing prohibition. Judge Bennett correctly determined that such a requirement is unnecessary and unduly burdensome.

Evidence presented at the hearing on the merits explains how SCC ensures compliance with the prohibition on the crushing of asbestos-containing materials without

¹¹⁴ Applicant's Ex. 8, at 2-3 (Draft Permit).

¹¹⁵ Proposed Order, at 21.

¹¹⁶ PFD, at 38; Proposed Order, at 17.

creating needless records. As noted in the PFD, it is illegal for any person to deliver asbestos-containing materials to one of SCC's crushing yards.¹¹⁷ Moreover, the limited concrete products that may contain asbestos are easily recognizable: concrete pipe and tiles.¹¹⁸ At the hearing, SCC presented evidence describing the hands-on training that SCC gives its employees regarding the identification of asbestos-containing materials and the three points at which SCC inspects incoming concrete to ensure that no asbestos-containing material enters the crusher: (1) an SCC employee uses a camera to view each load of raw material to be dropped at the site while the truck sits on the scales; (2) an SCC employee observes the material as it is dropped onto the pile; and (3) SCC employees inspect material as it moves into the crusher.¹¹⁹ SCC will not crush asbestos-containing material at the 288 Yard.

Contrary to the exceptions made by Harris County and the City of Houston, the permit's prohibition on crushing asbestos-containing material is fully enforceable without the unduly burdensome and unprecedented recordkeeping sought by the parties. The PFD correctly states that inspection and testing conducted by any agency with regulatory authority could reveal whether asbestos has been crushed at the site, and that such a finding would be sufficient basis for an enforcement action.¹²⁰ Most importantly, the record includes a description of SCC's practices that protect the public from any harm that could result from the crushing of asbestos-containing material. Recordkeeping to demonstrate compliance with the prohibition on crushing asbestos is unnecessary, and the record supports Judge Bennett's ruling that it should not be added to the draft permit.

VIII. Conclusion

The portable concrete crushing facility that SCC seeks to relocate in this matter will emit a total of less than 2.5 tons per year of particulate matter emissions. The nearest residence is over 3000 feet away from the proposed crusher location. SCC's emissions calculations and modeling are accurate and reliable, and have been performed in strict compliance with TCEQ emissions calculations and modeling guidelines. Based on the results of that modeling, operation of the 288 Yard in accordance with the draft permit as modified by the

¹¹⁷ PFD, at 38; Proposed Order, at 17; Applicant's Ex. 9, at 7 (Executive Director's Response to Public Comment).

¹¹⁸ Applicant's Ex. 51, at 20:7-8 (J. Miller); 1 Tr. 34:1-2 (J. Miller); 2 Tr. 454:23-455:5 (E. Guynn).

¹¹⁹ 1 Tr. 116:24-117:14, 129:15-130:13 (J. Miller).

¹²⁰ PFD, at 38.

Judge Bennett's proposed new conditions will not have an adverse effect on the health of the requesters who live within one mile of the facility, nor will it not adversely affect the ability of the requesters to use and enjoy their property, or cause damage to the requesters' property.

The Protestants in this matter base their case on inaccurate emissions calculations and a modeling methodology that fails to reliably or accurately predict the impacts from SCC's proposed 288 Yard operations. Moreover, Harris County's toxicologist holds SCC to questionable "standards" that are far below the current NAAQS. The parties opposing SCC's request use flawed methods and bad science in presenting their case. Following careful consideration of the record, Judge Bennett properly found SCC's modeling more reliable and its expert witness testimony more persuasive with regard to potential health impacts. SCC accurate and reasonable evaluation of the potential impacts of SCC's change of location request demonstrates that the 288 Yard operations will be protective of human health and the environment.


The draft permit that the Executive Director has prepared for SCC's proposed 288 Yard operations is protective, and the additional conditions recommended by Judge Bennett will help ensure that 288 Yard operations will not adversely impact any residence or nearby business. Stockpile emissions are adequately addressed in the permit conditions, and Judge Bennett has added a stockpile height limit and specific watering requirements. Judge Bennett has also recommended additional recordkeeping, with the creation of a log documenting all on-site watering activities. The recordkeeping requirements set forth in the draft permit are sufficient to enable enforcement of the permit conditions. Recordkeeping relating to the permit's prohibition on the crushing of asbestos-containing materials is both unprecedented and unnecessary.

Accordingly, SCC respectfully requests that the Commissioners issue an Order approving SCC's change of location request and directing issuance of Air Quality Permit No. 70136L001 authorizing construction and operation of a portable concrete crushing facility at SCC's 288 Yard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March, 2006, a true and correct copy of Applicant Southern Crushed Concrete, Inc.'s Reply to Exceptions and Brief in Support of Proposal for Decision was served on the following via electronic mail and U.S. mail:

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